UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

GOODWILL INDUSTRIES OF
NORTH GEORGIA, INC.

Employer

and Case 10-RC-15312

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 926, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Goodwill Industries of North Georgia, Inc., the Employer herein, a Georgia non-profit corporation, with an office and place of business in Atlanta, Georgia, is engaged in providing rehabilitative services and employment programs to disabled individuals. The Petitioner, International Union of Operating Engineers, Local 926, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time janitorial workers employed by the Employer at the Centers for Disease Control ("CDC") in Chamblee, Georgia, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act. A hearing officer of the Board held a hearing and the Employer and the Union filed post-hearing briefs with me.

The sole issue raised at the hearing and in the post-hearing briefs is whether, according to the Employer, 20 of the 26 janitorial workers employed at the CDC's Chamblee campus should not be considered employees under the Act because they are disabled and are under the rehabilitative care of the Employer. The Union contends the Employer has not demonstrated that the 20 individuals in question are disabled or that their employment is primarily rehabilitative in nature. Accordingly, the Union maintains, they should be included in the unit as Section 2(3) employees.

I have considered the evidence and the arguments presented by the parties on this issue. As discussed below, I have concluded that the Employer has failed to show that its relationship with the 20 disputed workers is primarily rehabilitative, or that the working conditions of these individuals are not typical of private sector working conditions. Accordingly, I have concluded that the 20 disputed janitorial workers are employees as defined in Section 2(3) of the Act.

To provide a context for my discussion of this issue, I will first provide an overview of the Employer's operations. I will then present in detail the facts and reasoning that support my conclusion on this issue.

I. OVERVIEW OF THE EMPLOYER'S OPERATIONS

The Employer's Vice President for Human Resources testified that "our mission is to employ individuals with barriers to employment." The Employer's operation consists of five departments, including two "support" departments (i.e., human resources, finance) and three revenue-generating departments[1]: (1) Donor

[1] The Employer's revenues significantly increased in 2001 and 2002 (from approximately $16 Million in 2000, to approximately $19 Million in 2001 and projected $23 Million in 2002). Further, the Employer's

Services; (2) Career Services; and (3) Contract Services. The Donor Services department is responsible for donations. The Career Services department provides training, employment and counseling services for individuals with obstacles to employment. These individuals are usually referred to Career Services by other governmental or private programs, such as substance abuse treatment programs, mental retardation programs, and other vocational rehabilitation-type programs. Career Services provides a range of counseling and training programs, covering "soft skills" training (e.g., interpersonal skills) and job-specific training, such as custodial service. Career Services also places its "clients" with outside employers on a regular basis. For example, in fiscal year ending June 30, 2002, Career Services placed 863 clients with outside employers.

The Contract Services department enters into and maintains contracts with a number of governmental agencies pursuant to the Javits-Wagner-O'Day Act ("JWODA")[2], including the CDC. Pursuant to contracts with the CDC, the Employer provides janitorial services at three CDC campuses in the Atlanta area: Chamblee; Lawrenceville; and Clifton Road. The instant petition involves only the CDC's Chamblee campus. For the Employer to qualify for a contract under the JWODA, 75% of the workforce performing the contract services must be "severely disabled."[3]

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operation generated a modest profit of approximately $67,000 in 2001, and a more substantial projected profit of approximately $566,000 in 2002.

[2] 41 U.S.C. Sec. 46-48c.

[3] Under JWODA, a severely disabled individual is a person other than a blind person who has a severe physical or mental impairment which so limits the person's functional capabilities that the individual is unable to engage in normal competitive employment over an extended period of time. 41 U.S.C. Sec. 48b(2). See Baltimore Goodwill Industries v. NLRB, 134 F.3d 227, 157 LRRM 2202 (4th Cir. 1998).

As is noted above, the Employer contends that 20 of 26 janitorial workers at Chamblee are disabled, presumably within the meaning of the statutory definition.[4]

II. JANITORIAL WORKERS EMPLOYED AT CDC'S CHAMBLEE CAMPUS

The Employer's Project Manager for the CDC facilities testified regarding the janitorial workers employed by the Employer at the CDC's Chamblee campus. The CDC's Chamblee campus is comprised of approximately twenty buildings, most of which are single story. As of the hearing, the Employer employed 26 workers classified as custodians to provide janitorial services for these twenty buildings, including cleaning lavatories, offices, and public areas. Of the 26 janitorial workers, both the Union and the Employer agree that 6 are *not* disabled and are, therefore, Section 2(3) employees.[5]

Of the remaining 20[6] of 26 janitorial workers, 6 were referred for employment by the Employer's Career Services Department and 6 workers were referred for employment to the Employer by outside funding sources (such as drug or vocational rehabilitation programs). The Employer's Project Manager for the CDC testified that none of the remaining 8 was referred by any program; they evidently applied and were hired off-the-street, perhaps in response to advertisements (which state "disabled individuals welcome") placed by the Employer in local newspapers.

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[4] The Employer's report for JWODA purposes for fiscal year ending September 30, 2000 shows that it employed a total number of 149 "people with severe disabilities"; this number constituted 77.84% of the workforce for JWODA purposes.

[5] These employees are Wanda Johnson; Yvonne Mutombo; George Ogum; Yen Pham; Jada Usher; and Jacquelyn White. Both the Union and the Employer are prepared to proceed to an election among these 6 employees, regardless of whether the 20 disabled individuals are found to be Section 2(3) employees.

[6] Although identified in the transcript of proceedings, the names of these 20 individuals are omitted from this Decision.

The janitorial workers at the CDC Chamblee campus work in two shifts: from 7 AM to 4 PM and from 3 PM to 11:30 PM. The day shift workers clean the laboratories, offices and common areas, while the night shift workers clean restrooms and perform most of the floor care. All 26 workers receive the same uniform wage rate of $7.39, the minimum rate for janitors set by the Department of Labor for JWODA contracts, and they also apparently receive the same minimum benefits required for JWODA contracts. Both the non-disabled and disabled workers are subject to the same supervision. The 26 janitorial workers are overseen on a day-to-day basis by the Employer's CDC Project Manager, by the site manager for Chamblee, and by another individual who is classified as a supervisor.[7]

The personnel records for all workers, including the 26 involved herein, are maintained by the Human Resources department, evidently at the Employer's central offices located at a different location (away from the CDC's Chamblee campus). The records for disabled workers are kept separately from records for non-disabled workers. The Employer's policy is to have *all* employees evaluated by a psychologist within 90 to 120 days of hire, for the purpose of determining disability. The psychologist's full report is evidently contained in each individual's personnel file, including the psychologist's assessment of disability.[8] Each individual is evaluated annually after hire by local supervision, based on observation by local supervision. The Employer requires management at each location to complete for every employee

[7] Both individuals are also classified as disabled by the Employer. They are paid at the rate of $12.50, and $9.09, respectively.

[8] These reports are evidently not made regularly available (if at all) to the Employer's local supervision at the CDC's Chamblee site. The Employer's CDC Project Manager testified that his records show only whether the psychologist has classified an employee as disabled ("yes" or "no").

(disabled or non-disabled) on an annual basis a Competitive Employment Statement, as required by JWODA Regulations.[9]

DISCUSSION – THE APPROPRIATE LEGAL STANDARD

The question before me is whether the 20 disabled individuals who work for the Employer at the CDC's Chamblee campus are employees within the meaning of Section 2(3) of the Act. In making this determination, the Board has historically looked at the employer's

relationship with the disputed individuals. When the relationship is primarily rehabilitative and working conditions are not typical of private sector working conditions, the Board has indicated that it will not find statutory employee status. Goodwill Industries of Tidewater, Inc., 304 NLRB 767, 768 (1991); Goodwill Industries of Denver, 304 NLRB 764, 765 (1991); Goodwill Industries of Southern California, 231 NLRB 536 (1977); compare Arkansas Lighthouse for the Blind, 284 NLRB 1214, 1216-17 (1987).

In one of the earlier cases on this question, the Board described the relevant inquiry as whether the "*single overriding purpose* of the 'employer-client' relationship" is rehabilitation." (Emphasis supplied.) If the answer is yes, then the employer's "work program, and the production associated with it," is "one element of the rehabilitation plan, not an enterprise in itself." Cincinnati Association for the Blind, 235 NLRB 1448 (1978). The Board's reasoning in declining to assert jurisdiction where the employment relationship is primarily rehabilitative is that "the

[9] The Competitive Employment Statement is a one-paragraph, 6-line report stating whether a particular worker "(is/is not) capable of independently obtaining and maintaining a job in a competitive work environment at this time."

employer may . . . safeguard employee interests more effectively than a union," and "to permit collective bargaining in this context is to risk a harmful intrusion on the rehabilitative process by the Union's bargaining demands." Thus, the assertion of jurisdiction over individuals employed in such a rehabilitative relationship would not effectuate the purposes of the Act. Goodwill Industries of Southern California, 231 NLRB at 537-8.

On the other hand, if the employment relationship is guided to a great extent by business considerations and may be characterized as a typically industrial relationship,

statutory employee status has been found.[10] Huckleberry Youth Programs, 326 NLRB 1272 (1998); Davis Memorial Goodwill Industries, Inc., 318 NLRB 1044 (1995), but see Davis Memorial Goodwill Industries v. NLRB, 108 F. 3d 406, 154 LRRM 2801 (D.C. Cir. 1997); Baltimore Goodwill Industries, Inc., 321 NLRB 13 (1996); but see Baltimore Goodwill Industries v. NLRB, 134 F. 3d 227; 157 LRRM 2202 (4th Cir. 1998). The Board has applied a case-by-case approach in these situations to determine whether the employment relationship is "primarily

[10] In one case involving this issue, Arkansas Lighthouse, the Board indicated that if the individuals' "working conditions are 'in dominant measure' typical of private sector working conditions," then they "constitute the normal and usual grist for the mill of collective bargaining" and the individuals should be considered Section 2(3) employees, subject to the protections of the Act. 284 NLRB at 1217 (Citations omitted).

rehabilitative" or "typically industrial". If I conclude the former in the instant case, then I must find the 20 disabled individuals to be ineligible voters, consistent with the Board's policy decision that it would not effectuate the purposes of the Act to assert jurisdiction over individuals where "the collective bargaining process . . . is likely to distort the unique relationship between [E]mployer and client and impair the [E]mployer's ability to accomplish its salutary objectives." Goodwill Industries of Southern California, 231 NLRB at 538.

As I noted above, I have concluded that the Employer has failed to show that its relationship with the 20 disputed workers is "primarily rehabilitative", or that the working conditions of these individuals are not typical of private sector working conditions. In reaching this conclusion, I have weighed the evidence and arguments on each of the factors

the Board considers in its case-by-case analysis in these cases, as set forth below.

(A) Support Services, Training and Rehabilitative Assistance

There was testimony by Employer representatives at the hearing that the Employer's Career Services department makes available support services, training and rehabilitative assistance to disabled employees, though these kinds of services and assistance are not made available to non-disabled employees. However, for the 8 disputed disabled employees who were presumably hired off-the-street (and not as referrals from the Employer's Career Services department or outside programs), there is no evidence that any of them has taken advantage of any support services or

training by the Employer, or that they are even aware that they may do so, as the Employer contends.[11]

The same is true for the 6 individuals referred for employment by outside programs. There is no evidence that they are aware that support services and training are available from the Employer, or that any of them ever took advantage of such services offered by the Employer.[12] Further, the record does not demonstrate how frequently (if at all), they seek counseling or training from their case managers at the outside programs which referred them or whether the Employer has ever directed any of them back to these outside programs for further counseling or training. The record is also silent on whether the Employer coordinates on a regular basis with the outside programs which referred these 6 employees on matters relating to additional counseling or training for them.[13] Based on the foregoing, the evidence is insufficient to establish that the Employer *actually* provides any significant support services, training or other rehabilitative assistance to either the 8 employees hired off-the-street or to the 6 employees referred by outside programs.

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[11] One of these 8 employees testified at the hearing that she did not know until the hearing that the Employer classified her as disabled or that any training or support services could be made available to her because she was classified as disabled. The only "counseling" she received, she testified, was when the psychologist gave her a "test" when she was first hired.

[12] According to the Employer's Project Manager for the CDC facilities, one of these employees "came into the work setting at a late stage in life" and "could just not seem to adjust to the work setting." He testified that in February, 2000, "we finally called Career Services so that they could send someone out to talk with that person." He testified she was "counseled" at that time, but the record does not reveal what the nature of her difficulty was, or the kind of assistance she received.

[13] The testimony of the Employer's Project Manager for the CDC suggests that there is no significant coordination with outside programs. He testified that he is not aware when or if any of these individuals seeks assistance from the outside source which referred them, "because they can either meet with that person [from the outside source] on the job or off the job. That is up to them, so I would not be aware of that."

As to the 6 individuals referred by the Employer's Career Services department, there is no specific evidence with regard to support services, training or other rehabilitative assistance provided to them by the Employer, either at the CDC's Chamblee campus or off-site. The Employer's Vice President of Career Services testified about the general procedures followed for *all* individuals referred for employment by Career Services to *any* employer. Each individual (regardless of employer) is usually assigned a Career Services Case Manager and Job Coach for a period of time. The Case Manager typically provides assistance with child care, transportation, and coordination on other issues (e.g., substance abuse programs). The Case Manager typically limits contacts to once per quarter with the assigned individual after the first year of employment. The Job Coach may actually provide guidance and intervention in the workplace, in the event of problems. Though there was much general testimony of this nature, there was no specific evidence offered as to whether any counseling, training or other rehabilitative assistance has actually been provided by the Employer to these 6 individuals on a regular basis, and if so, of what kind. In the absence of such evidence, I am unable to conclude that counseling or rehabilitation is, *in actual practice*, a significant aspect of the Employer's employment of the 6 individuals referred by the Employer's Career Services department for employment at the CDC's Chamblee campus.

(B) Discipline

It is clear that all individuals employed at the CDC's Chamblee campus, both disabled and non-disabled, are subject to the same employee handbook and the same employee rules of conduct. The Employer argues, however, that the penalties for

rules violations differ significantly for disabled employees, because they are typically offered additional counseling in lieu of immediate discipline. The record reveals two instances of recent discipline of disabled individuals working at the CDC's Chamblee campus. One individual was counseled six times over an eighteen-month period before being terminated for inadequate work performance. In contrast, a non-disabled employee was counseled only three times before being terminated for inadequate performance.

In a more recent situation which took place only a few days before the hearing, a disabled employee at the CDC's Chamblee campus was suspended, pending further investigation, for repeatedly refusing to perform an assigned work task. The Employer's Project Manager for the CDC testified that the employee will soon be returned to work with additional counseling, and will be paid for all but one day for which he was suspended. According to the Project Manager, he would have been terminated immediately were he not disabled. In this regard, the Employer points to an instance in which a non-disabled employee was terminated because of an altercation with another employee, after being suspended pending an investigation.

The foregoing examples establish that the Employer is more flexible in matters of discipline with disabled employees than with non-disabled employees. However, it is also clear from the foregoing that disabled employees may be subject to substantial penalties: they can be suspended without pay for refusing to perform assigned work tasks and can also be fired for inadequate job performance. Thus, disabled employees are subject to severe discipline, albeit after additional investigation or counseling. See Huckleberry Youth Programs, supra; Davis Memorial, supra. In any event,

though the Employer's flexibility or leniency in the imposition of discipline is no doubt reflective of its compassionate mission, it is also similar in approach to progressive discipline typically practiced by many employers in the industrial sector.

(C) Duration of Employment

There does not appear to be any significant difference between the duration of employment for non-disabled and disabled individuals employed by the Employer at the CDC's Chamblee campus. The record establishes that 3 of the non-disabled employees were hired recently in 2002, and 3 were hired in late 2001. Similarly, about half of the 20 disabled employees were hired in 2001 or earlier, and the balance were hired in 2002.

Although the Employer's goal is to place disabled employees in competitive work environments, it does not appear that disabled individuals often leave the Employer's employ at the CDC's Chamblee campus. In fact, the Employer's Vice President for Career Services testified that the JWODA wages paid for custodial workers are higher "than what we are seeing in the competitive market." Thus, Career Services "clients" interested in custodial work prefer to be placed in locations subject to contracts negotiated by the Employer's Contract Services department with governmental entities (like the CDC). This perhaps accounts for the relatively low outside placement rate among disabled individuals at the CDC's Chamblee campus.[14] The Employer's CDC Project Manager testified that only one disabled individual from the Chamblee site had been placed with an outside employer in the last two years. Further, there is no evidence of any temporary or permanent transfers out of

[14] There is apparently no job placement coordinator located at the Chamblee site.

the facility for rehabilitative purposes. Moreover, there is no evidence that the Employer maintains certain positions only for short-term transitional employment. Thus, while placement in a competitive environment is a laudable rehabilitative goal, there is insufficient evidence to establish any significant track record geared toward outside placement of the disabled individuals employed at the CDC's Chamblee campus.

(D) Wages, Hours and Other Terms of Employment

As is noted above, all employees, disabled and non-disabled alike, receive the same uniform wage rate and benefits. Thus, individual compensation does not vary with production or merit and is therefore not designed to promote any rehabilitative purpose. There is also no separate supervision for disabled individuals and non-disabled individuals. All of the employees evidently work the same hours, depending on shift, with no special hours or breaks arranged for disabled individuals.[15]

As to job assignments, the Employer's Project Manager for the CDC testified that disabled individuals are typically assigned the areas which are easier to clean (because of less foot traffic), such as upper areas in multi-story buildings or smaller one-level buildings. However, one non-disabled individual called as a witness by the Petitioner claimed that all individuals on her shift performed basically the same functions. The Employer's CDC Project Manager stated that floor care duties were more difficult than other duties, but acknowledged that some of the disabled workers perform these duties.

[15] The Employer contends that disabled employees are given breaks for the purpose of taking medication. However, one witness called by the Petitioner testified that an employee with diabetes was told he could not take a break to take medication until he completed his work assignment.

The Employer's CDC Project Manager testified that disabled individuals are permitted to "work at their own pace." However, he also indicated that all assigned tasks are required to be completed at the end of an eight-hour shift. Thus, the evidence regarding assignment and completion of job assignments is a mixed bag. The Employer evidently grants some leeway to disabled individuals, notwithstanding the Petitioner's contention to the contrary. However, there is no evidence that the Employer has implemented minimum productivity standards, or any other means of measuring disabled workers' progress in rehabilitation towards more competitive work and outside placement.

Based on the above and my review of the record and applicable law, I find that the Employer has failed to show that its relationship with the 20 disputed workers is primarily focused on rehabilitation. Further, I find that the working conditions of these individuals are typical of private sector employment, "the normal and usual grist for the mill of collective bargaining." Arkansas Lighthouse, supra. The 20 disabled workers earn the same wage rate and benefits as non-disabled employees. They are assigned substantially the same custodial tasks and are subject to the same daily supervision as non-disabled employees. The 20 disputed workers, like non-disabled employees, are also subject to severe disciplinary penalties, such as suspension or discharge, albeit after additional investigation or counseling. The wages paid by the Employer for custodial work at the CDC's Chamblee campus are competitive for the Atlanta market, and there is no showing that any of the disabled workers wants to leave the Employer's employ, or that the Employer has placed a significant number of the Chamblee site workers with outside employers. I therefore find that the 20

disputed disabled workers are employees within the meaning of Section 2(3) of the Act.

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time janitorial workers employed by the Employer at the Centers for Disease Control in Chamblee, Georgia, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.[16]

[16] The unit description is substantially in accord with a stipulation of the parties.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union of Operating Engineers, Local 926, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who are employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, or on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began; and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Suite 1000, Harris Tower, 233 Peachtree Street, N.E., Atlanta, Georgia 30303, on or before **October 11, 2002**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (404) 331-2858. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570-0001. This request

must be received by the Board in Washington by 5:00 P.M., (EST) on **October 18, 2002**. The request may **not** be filed by facsimile.

Dated at Atlanta, Georgia, on this 4th day of October, 2002.

/s/ Kenneth D. Meadows
Kenneth D. Meadows, Acting Regional Director
National Labor Relations Board
Harris Tower – Suite 1000
233 Peachtree St., N.E.
Atlanta, Georgia 30303

177-2478